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TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1940

No. 34

L. SINGER & SONS ET AL., PETITIONERS,

vs.

UNION PACIFIC RAILROAD COMPANY

No. 35

KANSAS CITY, MISSOURI, PETITIONER,

vs.

L. SINGER & SONS ET AL.

ON WRITS OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT

PETITIONS FOR CERTIORARI FILED MARCH 19, 1940.

CERTIORARI GRANTED APRIL 22, 1940.

SUPREME COURT OF THE UNITED STATES

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INDEX

	Original	Print
Proceedings in U. S. C. C. A., Eighth Circuit	a	1
Caption (omitted in printing)	a	
Record from D. C. U. S., Western District of Missouri	1	1
Caption (omitted in printing)	1	
Complaint	1	1
Motion of Kansas City, Missouri, for leave to intervene as a plaintiff	5	5
Exhibit "A"—Resolution of Council of Kansas City, Missouri, that City of Kansas City, Missouri, should intervene in suit, etc.	10	9

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—8523

	Original	Print
Record from D. C. U. S., Western District of Missouri—Continued		
Intervening petition of Kansas City, Missouri	12	11
Answer	20	18
Application of defendant to hear defenses asserted in first, second and third defenses in answer in advance of trial	24	22
Order denying motion of Kansas City, Missouri, for leave to intervene and dismissing complaint	25	22
Decree	25	23
Notice of appeal by L. Singer & Sons et al	26	24
Recital of mailing of copy to counsel for defendant	27	24
Notice of appeal by Kansas City, Missouri	27	25
Recitals of mailing of copies to counsel for plaintiffs and defendant	28	25
Stipulation designating parts of record and proceedings to be included in record on appeal (omitted in printing)	28	
Opinion of court, Collet, J.	30	25
Clerk's certificate to transcript (omitted in printing)	32	
Statement of points on appeal of L. Singer & Sons et al	32	28
Statement of points on appeal of Kansas City, Missouri	35	30
Appearances of counsel (omitted in printing)	38	
Order of submission in Cause No. 11480	41	32
Order of submission in Cause No. 11489	42	32
Opinion, Sanborn, J.	43	33
Dissenting opinion, Stone, J.	51	40
Decree	56	45
Motion of appellants to stay issuance of mandate in Cause No. 11480 (omitted in printing)	57	
Order staying issuance of mandate in Cause No. 11480 (omitted in printing)	59	
Motion of appellant to stay issuance of mandate in cause No. 11489 (omitted in printing)	59	
Order staying issuance of mandate in Cause No. 11489 (omitted in printing)	61	
Clerk's certificate (omitted in printing)	62	
Stipulation as to printing record	63	47
Orders allowing certiorari	65	48

[fol. a] [Caption omitted]

[fol. 1]

IN UNITED STATES DISTRICT COURT FOR THE WESTERN DIVISION OF THE WESTERN DISTRICT OF MISSOURI

No. 125

L. Singer & Sons, a Corporation; Wm. F. Helm, Doing Business as Wm. F. Helm Produce Company; Arthur Harris, Doing Business as Kansas City Fruit & Produce Company, Robert T. Kesting, Doing Business as H. Kesting Produce Company; Chester F. Urban, Doing Business as Maguire-Urban Commission Company; Fara D'Angelo, Doing Business as D'Angelo Celery House; [fol. 2] R. E. Mills, Doing Business as Mills Produce Company; H. R. Raker, Doing Business as Raker Produce Company; Ralph Hurst; Ralph Hurst & Company, a Corporation; Reuben Kaplan, Doing Business as Royal Food Stores; Earl J. Tranin; Merchants Bank Building & Investment Company, a Corporation, and North Side Business & Improvement Association, a Pro Forma Decree Corporation, Plaintiffs,

vs.

Union Pacific Railroad Company, a Corporation, Defendant

Complaint—Filed December 30, 1938

1. The action arises under the Act of February 4, 1887, 24 Stat. 379, entitled "An Act to Regulate Commerce," as amended by the so-called Transportation Act of February 28, 1920, 41 Stat. 456, U. S. C. Title 49, Section 1, paragraphs 18 to 21, inclusive, as hereinafter more fully appears.

2. Plaintiffs are engaged in the business of buying and selling at wholesale and retail, fruits, vegetables and other food products within and adjacent to the so-called City Market of Kansas City, Missouri, located at and near the intersection of Fourth and Walnut Streets in said City, or are directly interested in or connected with said busi-

ness. Said market has been in existence at said location for more than seventy-five years serving greater Kansas City and vicinity as a wholesale and retail produce market, and also serving numerous territories in other states to and from which perishable and other produce bought and sold in said market is transported. The City of Kansas City, Missouri, is now engaged in the construction of new wholesale and retail market buildings and facilities in said vicinity at a cost of approximately $500,000.00. Said market is now and for a long period of time has been served by existing transportation facilities of various trunk line railroads, and said existing transportation facilities are suitable, convenient and adequate to meet the requirements of the market. The market is easily accessible to its customers through the facilities of said railroads and also by the use of streets and hard-surfaced highways radiating in every direction therefrom.

3. The defendant is now and was at all the times herein mentioned engaged in the business of transportation of pas- [fol. 3] sengers and property by rail between the city of Kansas City, Kansas, and points in other states, as a common carrier and is subject to the provisions of the Interstate Commerce Act as amended.

4. The defendant and the City of Kansas City, Kansas, propose to build and are now engaged in building a so-called "Food Terminal" or produce market on a tract of land owned by said City at or near the confluence of the Kansas (Kaw) and Missouri Rivers, to cost approximately $4,000,000.00, and designed to accommodate a large number of produce dealers. The money for said purpose has been obtained or will be obtained by (1) a grant from the Public Works Administration of $1,710,000.00, and (2) through defendants purchase of 4% Revenue Bonds of the par value of $3,000,000.00 issued by the City of Kansas City, Kansas.

5. Within the last sixty days the defendant has entered into contracts with the City of Kansas City, Kansas, whereby,

(a) defendant purchased from said City $3,000,000.00 par value of the aforesaid Revenue Bonds;

(b) defendant leased from said City at an annual rental of $10,760.00 a year for a period of thirty years a tract

of land containing an area of approximately twenty-five (25) acres, adjacent to said proposed produce market and upon which said tract of land defendant has declared its purpose and intention of building thereon numerous railway tracks and other facilities costing approximately $500,000.00; that the defendant is now engaged in building the main leads from which such tracks will be built.

(c) defendant also agreed, and has declared its purpose and intention, to construct and operate, or to construct, or to operate, a track or tracks to serve said new produce market. Interstate shipments to and from said proposed new produce market will be handled by the defendant over said track or tracks.

6. The said tracks, agreed and proposed to be built and operated, or built or operated by the defendant, constitute an extension or extensions of its line or lines of railway within the provisions of the Interstate Commerce Act, as [fol. 4] amended, and particularly Section 1, paragraphs 18 to 21, inclusive, thereof, U. S. C. Title 49, Section 1, paragraphs 18 to 21, inclusive.

7. Defendant has not obtained from the Interstate Commerce Commission a certificate that the present or future public convenience and necessity require or will require the construction or operation, or construction and operation of such extension or extensions of said lines as required by the provisions of said Act cited in the next preceding paragraph of this Complaint.

8. The construction and operation, or the construction, or the operation of the aforesaid extension or extensions of railroad by the defendant to said produce market in Kansas City, Kansas, will

(a) destroy or seriously and adversely affect the businesses and properties of plaintiffs and others and the large investments of money which the plaintiffs, and others have made in and adjacent to the Kansas City, Missouri, produce market;

(b) create a rival market on a barren sandy tract of land dedicated as a public levee to be used in connection with water transportation at a location far removed from the center of population of this community and incon-

venient to a great majority of the citizens of greater Kansas City;

(c) create a rival market without producing additional produce to be handled therein, or additional consumers to be served thereby, when the present Kansas City, Missouri, market has adequate facilities for and is capable of serving this entire community;

(d) result in an unnecessary duplication of railroad facilities at a cost of more than $500,000.00 without increasing the freight to be handled;

(e) divert traffic to the defendant from other railroad companies which have adequate facilities and are now handling the traffic to the Kansas City, Missouri, produce market;

(f) cause destructive competition between the defendant and other railroad companies operating in this vicinity;

[fol. 5] (g) result in wasteful and needless expenditure of money by the defendant.

For each and all of the reasons aforesaid, the construction and operation, or the construction, or the operation of the said extension or extensions of railroad by the defendant to said proposed produce market in Kansas City, Kansas, will directly and adversely affect the property interests of the plaintiffs and the public generally by bringing about a material change in the transportation situation, and will constitute an unnecessary burden upon interstate commerce directly and adversely affecting the welfare of plaintiffs and the public interest.

9. Defendant will, unless enjoined by this court, construct and operate, or construct, or operate, said extension or extensions of its lines without making application for and obtaining from the Interstate Commerce Commission the said certificate of public convenience and necessity.

Wherefore, plaintiffs demand that defendant be restrained and enjoined from constructing and operating said extension or extensions of its lines of railroad into and about the food terminal or market proposed to be erected by the City of Kansas City, Kansas, until such time as defendant has applied for and obtained from the Interstate Com-

merce Commission a certificate that the present or future public convenience and necessity require or will require the construction or operation, or construction and operation of such extension or extensions of said lines, and that plaintiffs have such other and further relief as is just.

Ruby D. Garrett, 822 Scarritt Bldg., Kansas City, Mo.; Fred Ruark, 822 Scarritt Bldg., Kansas City, Mo., Attorneys for Plaintiffs.

IN UNITED STATES DISTRICT COURT

MOTION OF KANSAS CITY, MISSOURI, FOR LEAVE TO INTERVENE AS A PLAINTIFF—Filed January 14, 1939

Comes now Kansas City, Missouri, a municipal corporation, a constitutionally chartered city organized and exist- [fol. 6] ing under and pursuant to Section 16, of Article 9, of the Constitution of Missouri of 1875, as amended, and moves for leave to intervene as a plaintiff in this action, in order to assert its claims and rights to relief set forth in its proposed intervening petition, of which a copy is hereto attached, upon the following grounds and for the following reasons:

1. The action arises under the Act of February 4, 1887, 24 Stat. 379, entitled, "An Act To Regulate Commerce" as amended by the Interstate Commerce Act February 28, 1920, c. 91, paragraph 441, U. S. C. A. title 49, Section 1, paragraphs 18 to 21 inclusive and seeks to enjoin the defendant from constructing and operating a certain extension or extensions of its line of railroad thereto and about a projected food terminal or market proposed to be erected by the city of Kansas City, Kansas until such time as the defendant has applied for and obtained from the Interstate Commerce Commission a certificate of convenience and necessity for the construction and operation of such extension or extensions as provided for by Section 1 (18), of said Interstate Commerce Act.

2. It is the contention of this applicant that the following statutes of the United States confer upon it an unconditional right to intervene, to-wit, Section 1, paragraph 20, of said Interstate Commerce Act, which provides that any construction, operation or abandonment contrary to the

provisions of such paragraph or paragraphs 18 or 19 of said Section 1, of said Act, may be enjoined by any court of competent jurisdiction at the suit of any party in interest. Such interest is hereinafter set forth in paragraphs 5 (a) to 5 (h) of this motion. Such section would, therefore, give Kansas City the right to institute a suit such as the pending one and therefore by necessary implication would confer the unconditional right of intervention herein.

The Judicial Code, Sections 212, 213 Amended (Title 28 U. S. C. A. Sec. 45a) provides that communities who are interested in a controversy or question before the Interstate Commerce Commission or in any suit which may be brought by anyone under the provisions of the aforesaid sections relating to action of the Interstate Commerce Com-
[fol. 7] mission, may intervene in said suit or proceeding at any time after the institution thereof. This section, by necessary implication, confers upon applicant the right to intervene as of right because the pending action is one to compel defendant to proceed before said Interstate Commerce Commission to obtain the necessary authority for said proposed construction which if and when done would confer upon applicant the right to intervene before said Commission upon a mere showing of interest in such pending controversy or question before such Commission. The statement of such interest is hereinafter set forth in paragraphs 5 (a) to 5 (h) of this motion.

3. This applicant also asserts a right to intervene as a matter of right because the representation of the applicant's interest by existing parties plaintiff is, or may be, inadequate and the applicant is, or may be bound by judgment in this action. The reasons for which are hereinafter set forth in paragraphs 5 (a) to 5 (h) of this motion.

4. Should the court determine that this applicant may not intervene as of right, Kansas City claims the right of permissive intervention herein for the following reasons:

The aforesaid statutes cited to the court in paragraph 2 hereof, if they do not confer an unconditional right to intervene herein, do by their express terms and by necessary implication, confer a conditional right to intervene here, because applicant claims and the main action have a question of law or fact in common. The intervention, if granted by the court, will not unduly delay or prejudice

the adjudication of rights of the original parties hereto. The reasons for such permissive intervention, in the event applicant has no intervention of right, are set forth in paragraphs 5 (a) to 5 (h) of this motion.

5. The grounds for applicant's intervention of right or for permissive intervention are as follows:

(a) Subsequent to the institution of this suit and on January 9, 1939, a petition was filed with the City Manager of Kansas City, by forty-one produce merchants, property owners and business men of Kansas City, Missouri requesting that Kansas City intervene in this suit and that pursuant to said petition there was introduced in the Council [fol. 8] of Kansas City, on January 9, 1939, a resolution, a certified copy of which is hereto attached and marked exhibit "A", authorizing Kansas City to intervene in said suit and directing the City Manager to have the City Council of Kansas City file such pleadings as may be necessary for said city to intervene herein, which said resolution was duly passed by unanimous vote of the Council of said city on January 9, 1939.

(b) On May 26, 1931, pursuant to a bond election duly authorized, the people of Kansas City voted one-half million dollars in bonds to be used in the construction of a new wholesale and retail market in Kansas City, Missouri, which said new market is now under construction by applicant.

(c) For seventy-five years, there has been built up in Kansas City, Missouri a large volume of business and a great number of merchants engaged in buying and selling at wholesale and retail fruits, vegetables and other food products in and around the City Market center in Kansas City, Missouri, located between 3rd and 5th Streets and Main Street and Grand Avenue; that as a complement to such business, there are a great number of firms in said city engaged in businesses connected with and bearing a direct relation to the business of said wholesale and retail produce merchants and dependent upon the business of said merchants. As a result thereof, said wholesale and retail produce merchants and the firms and organizations connected therewith and dependent thereon have invested in real estate, buildings, improvements and equipment in and about said Market Center, many millions of dollars. Said Market Center is now and has been equipped for

many years with more than adequate railroad and transportation service, storage facilities, loading docks, team tracks and other appurtenances necessary to a marketing center for a large urban population. Said markets and the facilities connected with their said businesses are fully equipped and able and have been serving numerous adjacent territories to Kansas City in the State of Missouri and in other states of the United States. Said Market Center is [assessible] to all portions of the surrounding territory and the territory in other states by complete system of hard [fol. 9] surface roads and steam and electric transportation. In the last few years, the aforesaid facilities have been more than adequate to supply the demand and such will be the case for years to come.

(d) The proposed plan and scheme of defendant is to promote the erection of said competing market center in Kansas City, Kansas and to build the necessary extension of its lines to serve the same wherein and whereby it will be enabled to control the operation thereof and divert revenues from Kansas City, Missouri and from the persons engaged in said wholesale and retail produce business and its complementary industries and that thereby there will accrue to it a large amount of freight and other revenue which will be diverted from the territory in Kansas City, Missouri which has built up and developed such business for the past seventy-five years.

(e) That the aforesaid firms, corporations and individuals engaged in the wholesale and retail produce business and the corporations individually and firms engaged in the complementary industries thereto in each and every year pay to Kansas City large amounts in real estate, personal and occupation taxes and licenses and if defendant is permitted to proceed with the promotion of said market and construction of said tracks without first obtaining a certificate of convenience and necessity from the Interstate Commerce Commission, as provided by law, that Kansas City, Missouri will be in danger of losing a great amount of revenue from the payment of such taxes caused by the depreciation of the property, of its tax paying citizens as aforesaid, and due to the fact that many of the same will remove from Kansas City and carry on their business in said competing Market Center.

(f) All the aforesaid reasons constitute questions of law and fact in common with applicant's claim and the cause of action set forth in the plaintiffs' petition.

(g) The representation of the applicant's interest by the plaintiffs for the foregoing reasons is inadequate and as to the right of defendant to construct said railroad extensions, the judgment in this action would be binding upon applicants, there being no public or quasi public body with any interest in the subject matter which could adequately represent Kansas City, Missouri as a party to this suit.

[fol. 10] (h) That the foregoing statements of fact clearly show the need of the city of Kansas City, Missouri to intervene to protect the public interests of its residents and in order that the process of this court shall not unduly prejudice their interest.

6. For the purpose of alleging federal jurisdictional requirements if the same be necessary for the purpose of this motion, this applicant states; that Kansas City is a municipal corporation having its domicile in the Western Division of the Western District of Missouri and is a citizen of the State of Missouri, and that the defendant is a corporation not a resident of the State of Missouri, but organized under the laws of the United States, and that the amount in controversy exceeds, exclusive of interest and costs, the sum of $3,000.00 and that Kansas City as a plaintiff in the suit in which intervention is sought, would as plaintiff intervene on its own behalf and on behalf of all other citizens and taxpayers of Kansas City, Missouri, having a common and general interest in this proceeding, who are so numerous as to make it impracticable to bring them all before the court.

Wherefore, for the foregoing reasons, Kansas City, Missouri moves for leave to intervene, as aforesaid, as plaintiff herein.

Fred Bellemere, City Counselor. Marcy K. Brown, Jr., Assistant City Counselor, Attorneys for Kansas City, Missouri, Applicant for Intervention, Address: 2800 City Hall, Kansas City, Missouri.

EXHIBIT "A" TO MOTION

Resolution

Whereas, a suit has been filed in the United States District Court for the Western Division of the Western Dis-

trict, at Kansas City, Docket No. 125, by forty-one business men and corporations against the Union Pacific Railroad [fol. 11] Company seeking to enjoin that railroad from constructing and operating an extension of its line into a proposed Food Terminal in Kansas City, Kansas until it has secured a certificate of convenience and necessity from the Interstate Commerce Commission, as required by law; and

Whereas, a wholesale and retail market has been in existence in Kansas City, Missouri, for more than eighty years, adequately serving the needs of this community and its trade territory; and

Whereas, the citizens of Kansas City, Missouri, voted one-half million dollars in bonds to be used in the construction of a new wholesale and retail market in Kansas City, and that new market is now under construction; and

Whereas, the proposed produce food terminal in Kansas City, Kansas, would merely divide the present market business, without increasing the number of consumers or the amount of shipments to or from Greater Kansas City or its trade territory would greatly decrease property values and would be a wasteful duplication of existing market facilities and those now being constructed in Kansas City, Missouri, out of the bonds voted as aforesaid; and

Whereas, forty-one business men and corporations have petitioned Kansas City, Missouri, to intervene in the suit heretofore filed to enjoin the construction and operation of said extension track by the Union Pacific Railroad Company,

Now, Therefore, Be It Resolved by the Council of Kansas City, Missouri, that the city of Kansas City should intervene in said suit and that the City Manager be and hereby is directed to have the City Counselor of Kansas City, draw up and file such pleadings as may be necessary for the City of Kansas City to intervene in said suit.

Authenticated as passed this Jan. 9, 1939.

Bryce B. Smith, Mayor. Chas. W. Regan, City Clerk, by Wm. Dalton, Deputy. (Seal.)

[fol. 12] State of Missouri,
County of Jackson,
Kansas City, ss:

I, Chas. W. Regan City Clerk of Kansas City, Missouri, hereby certify that the annexed and foregoing is a true and correct copy of a Resolution of said City, No. 5176

Authenticated as passed this 9th day of January, 1939, as the same appears of record and on file in my office.

In Testimony Whereof, I have hereunto set my hand and affixed the seal of Kansas City aforesaid, this 14th day of January, 1939.

Chas. W. Regan, City Clerk, by M. Hook, Deputy.
(Seal.)

IN UNITED STATES DISTRICT COURT

[Title omitted]

INTERVENING PETITION OF KANSAS CITY, MISSOURI—Filed January 14, 1939

[fol. 13] 1. Comes now Kansas City, Missouri a municipal corporation and states that it is a municipal corporation having its domicile in the Western Division of the Western District of Missouri and is a citizen of the State of Missouri; that it is a municipal corporation with a constitutional charter organized and existing under and pursuant to Section 16, of Article 9, of the Constitution of Missouri of 1875, as amended.

2. That defendant Union Pacific Railroad Company is a corporation, organized by an Act of Congress on July 1, 1862, c 120, 12 Stat. 489, as amended, and is now and was at all times herein engaged in the business of transportation of passengers and property by rail between the city of Kansas City, Kansas and points in other states, as a common carrier, and is subject to the provisions of the Interstate Commerce Act.

3. This action arises under the act of February 4, 1887, 24 Stat. 379, entitled, "An Act To Regulate Commerce" as amended by the Interstate Commerce Act of February 28, 1920, 41 Stat. 456, U. S. C. A. title 49, Section 1, paragraphs 18 to 21 inclusive, as more fully is set out hereinafter. The plaintiffs herein, with the exception of Kansas City, Missouri, are persons, firms and corporations engaged in the business of buying and selling at wholesale and retail, fruits, vegetables and other food products within and adjacent to the City Market of Kansas City, Missouri, located between 3rd and 5th Streets and Main Street and Grand

Avenue in said city, or are directly interested in or connected with said businesses.

4. For seventy-five years, there has been built up in Kansas City, Missouri, a large volume of business and a great number of merchants engaged in buying and selling at wholesale and retail fruits, vegetables and other food products of every kind and character in and around said City Market, including the plaintiffs and many other firms, persons and corporations; there are also a great number of corporations, firms and individuals in said city engaged in businesses connected with and bearing a direct relation to the business of said wholesale and retail produce merchants and dependent upon the business of said merchants; that all of said wholesale and retail produce merchants and all [fol. 14] of said persons, firms and corporations engaged in other businesses serving said wholesale and retail produce merchants, as aforesaid, are citizens and residents of Kansas City, Missouri, and taxpayers in said city. These said merchant- have, over a period of seventy-five years, built up and developed a large body of business for the purpose of serving not only Kansas City, Missouri but Kansas City, Kansas and urban centers adjacent to both cities and also serving numerous territories in the states of Missouri and Kansas and in other states. To said market and the merchants aforesaid, are shipped an immense volume of food products of all kinds and character from every center in the United States producing such food products and the said products are distributed by said merchants in said territory in Missouri and Kansas and many other states, all of said transactions constituting trade in Interstate Commerce. Said wholesale and retail produce merchants and the firms and organizations connected therewith and dependent thereon have invested many millions of dollars in real estate, buildings, improvements and equipment in and about said City Market and its appurtenances is now and has been equipped for many years with more than adequate railroad and transportation service, storage facilities, loading docks, team tracks and other appurtenances necessary to a marketing center for a large urban population. Said market is now, and has been for many years, easily [assessible] to all portions of the surrounding territory and to other states, by a complete and adequate system of hard-surface roads and steam and electric transporta-

tion. In the last few years, such marketing facilities have been more than adequate to supply the demand and such will be the case for many years to come.

5. The defendant and the city of Kansas City, Kansas have proposed to build and are now engaged in the building of a "food terminal" or produce market, on a tract of land owned by Kansas City, Kansas, at or near the junction of the Kansas and Missouri rivers and it is publicly stated that the cost of the same will be approximately $4,000,000.00, and that it will be designed to accommodate a large number of produce dealers. The money for said project has been obtained or will be obtained by a grant from the Public Works Administration of PWA, $1,710,-[fol. 15] 000.00, and through defendant's purchase of certain Revenue Bonds, issued by Kansas City, Kansas, of the par value of $3,000,000.00, bearing four per cent interest.

6. Within the last sixty days, defendant has entered into a contract with the city of Kansas City, Kansas, whereby—

(a) Defendant purchased from said city $3,000,000.00 par value of the aforesaid Revenue Bonds;

(b) Defendant leased from said city, at an annual rental of $10,760.00, for a term of thirty years, a tract of land containing an area of approximately twenty-five acres, adjacent to said proposed produce market, and upon which said tract of land defendant has declared its purpose and intention of building thereon numerous railroad tracks and other facilities costing approximately $500,000.00, and that defendant is now engaged in constructing the main leads from which such tracks will be built;

(c) Defendant also agreed, and has declared, its purpose and intention, to construct and operate, or to construct, or to operate, tracks to serve said new produce market, and has announced that shipments in Interstate Commerce to and from said proposed new produce market will be handled by defendant over said track or tracks which it is now engaged in constructing.

7. Plaintiff states that it is provided by the terms of Section 1, Paragraph 18, of the Interstate Commerce Act, U. S. C. A. Title 49, Section 1, Paragraph 18, that no carrier by railroad, subject to this chapter, shall undertake the extension of its line of railroad, or the construction

of a new line of railroad, or shall acquire or operate any line of railroad or extension thereof, or shall engage in transportation under this chapter, over or by means of such additional or extended line of railroad, unless and until there shall first have been obtained from the Commission a certificate that the present or future public convenience and necessity require, or will require the construction, or operation, or construction and operation, of such additional or extended line of railroad.

8. The said tracks, agreed and proposed to be built and operated, or built or operated by the defendant, constitute [fol. 16] an extension or extensions of its line or lines of railway within the provisions of said Paragraph 18, of said Interstate Commerce Act, as amended, for the following reasons:

(a) Said tracks and extensions when constructed will be used and operated in Interstate Commerce and as a final destination and as a transfer point for rerouting to other states of defendant's railroad lines and other railroads and other forms of transportation, carload lots of produce and food products, and that defendant, as a part and parcel of said business, will necessarily have arrangements with other railroads for interchange of traffic and will participate in division of rates beyond its own road should the commodity shipped into said food terminal be carried further by some other railroad and will necessarily be a party to through billing on shipments both incoming and outgoing; that defendant will also operate its said track extensions at said food terminal as a clearing house for routing and re-routing of carload lots of produce and food products shipped to said point on its own road, and that said new extensions will function as a carrier of freight passing in continuous journey from the point of origin on defendant's line inside and outside of the state of Kansas to destinations beyond the state of Kansas. Plaintiff states that the charges for such service will be based upon the appropriate rates for through interstate movement of freight;

(b) Said extensions will create and be used in competition between defendant and other railroads now existing as parallel and competing lines. There now exists in Kansas City, Missouri the lines of many other railroads which now

and in the past have for a great number of years enjoyed the revenues accruing from the business built up by said produce merchants and other independent agents to the Kansas City, Missouri market and the facilities of said railroads for the handling of said freight are amply adequate and efficient. If defendant be allowed to complete and operate said extensions, without first obtaining said certificate of convenience and necessity from the Interstate Commerce Commission, the operation and use of said extensions will divert a large volume of freight revenue from said other railroads already serving this territory to the consequent injury of both defendant and said other railroads and of the public and will constitute the building of [fol. 17] a duplicate line of railroad which will depend for traffic revenue upon such income which defendant may divert from railroads already built which can only add to the total burden of maintenance and capital returns, which the public generally will be forced to pay.

(c) The use and operation of said extensions will seriously interfere with the use and operation of the lines of track, team tracks, loading docks and other appurtenances used by the railroads which have served Greater Kansas City and surrounding territory which are at the present time entirely adequate for all movements of freight to, through and from Kansas City, Missouri and Kansas City, Kansas.

9. The unauthorized construction and operation, or the construction or the operation, of the aforesaid extension or extensions of railroad by the defendant to said produce market in Kansas City, Kansas will seriously threaten and directly and adversely affect the welfare of all plaintiffs herein by bringing about a material change in the transportation situation in Kansas City, Missouri and will be deleterious to the public interest in securing and maintaining proper railroad service without undue loss in the following respects:

(a) It will destroy or seriously and adversely affect the businesses and properties of plaintiffs and others and the large investments of money which the plaintiffs and others have made in and adjacent to the Kansas City, Missouri produce market;

(b) It will create a rival market on a barren sandy tract of land dedicated as a public levee to be used in connection with water transportation at a location far removed from the center of population of this community and inconvenient to a great majority of the citizens of greater Kansas City;

(c) It will create a rival market without producing additional produce to be handled therein, or additional consumers to be served thereby, when the present Kansas City, Missouri, market has adequate facilities for and is capable of serving this entire community;

[fol. 18] (d) It will result in an unnecessary duplication of railroad facilities at a cost of more than $500,000.00 without increasing the freight to be handled;

(e) It will divert traffic to the defendant from other railroad companies which have adequate facilities and are now handling the traffic to the Kansas City, Missouri produce market;

(f) It will cause destructive competition between the defendant and other railroad companies operating in this vicinity;

(g) It will result in wasteful and needless expenditure of money by the defendant.

(h) That the aforesaid firms, corporations and individuals engaged in the wholesale and retail produce business and the corporations individually and firms engaged in the complementary industries thereto in each and every year pay to Kansas City large amounts in real estate, personal and occupation taxes and licenses and if defendant is permitted to proceed with the promotion of said market and construction of said tracks without first obtaining a certificate of convenience and necessity from the Interstate Commerce Commission, as provided by law, that Kansas City, Missouri will be in danger of losing a great amount of revenue from the payment of such taxes caused by the depreciation of the property, of its taxpaying citizens as aforesaid, and due to the fact that many of the same will remove from Kansas City and carry on their business in said competing Market Center.

(i) There are approximately seventy wholesale produce dealers in Greater Kansas City, not one of which is located in Kansas City, Kansas, the entire industry being located

in said City Market Center of Kansas City, Missouri. On May 26, 1931, pursuant to a bond election, duly authorized, the people of Kansas City, Missouri, voted one-half million dollars in bonds to be used in the construction of a new wholesale and retail market in Kansas City, Missouri, and at the present time there is being constructed in Kansas City, Missouri a large regional terminal produce market out of said bond funds, the entire ground upon which said market is being constructed having been owned by Kansas [fol. 19] City, Missouri since the incorporation of the city and part of which was deeded to the city with the express provision that it must be operated as a farmers and public market. If defendant is permitted to construct said track extensions, without first having the public convenience and necessity thereof determined according to law, it will result in Kansas City a duplication of produce terminals and a split market condition which only result in useless expenditure and waste of capital by defendant which can only be recouped by increased freight rates to the detriment of the public.

10. Plaintiff states that defendant has not applied to or obtained from the Interstate Commerce Commission a certificate that the present or future public convenience and public necessity require, or will require, the construction or operation, or construction and operation of such extension or extensions of said lines as required by the provisions of Section 1, Paragraph 18, of said Interstate Commerce Act cited herein.

11. Defendant will, unless enjoined by this court, construct and operate, or construct, or operate said extension or extensions of its lines without making application for and obtaining from the Interstate Commerce Commission the said certificate of public convenience and necessity.

12. Neither the Interstate Commerce Commission nor any Commission or relating board of the state of Kansas or the state of Missouri has instituted any proceeding to compel the relief sought in this action and Kansas City, Missouri being a party in interest for the aforesaid reasons, brings this action pursuant to Section 1, Paragraph 20, of said Interstate Commerce Act, 49 U. S. C. A., Section 1, (20). Plaintiff further states that the amount in controversy herein exceed, exclusive of interest and costs, the

sum of $3,000.00, and that Kansas City is a plaintiff in this suit acts on its own behalf and on behalf of all other citizens and taxpayers of Kansas City, Missouri and other wholesale and retail produce merchants not parties hereto, who all have a common and general interest in this proceeding but who are so numerous as to make it impracticable to bring before the court as parties hereto.

[fol. 20] Wherefore, plaintiff demands that defendant be restrained and enjoined from constructing and operating said extension or extensions of its lines of railroad into and about the food terminal or market proposed to be erected by the city of Kansas City, Kansas, until such time as defendant has applied for and obtained from the Interstate Commerce Commission a certificate that the present or future public convenience and necessity require, or will require the construction or operation, or construction and operation of such extension or extensions of said lines and that plaintiff have such other and further relief as is just.

Fred Bellemere, City Counselor, Marcy K. Brown, Jr., Assistant City Counselor, Attorneys for Plaintiff, Kansas City, Missouri, 2800 City Hall Building, Kansas City, Missouri.

[File endorsement omitted.]

IN UNITED STATES DISTRICT COURT

ANSWER—Filed January 18, 1939

Comes Now the defendant and for its answer to the complaint filed herein alleges and states:

First Defense

That the Court has no jurisdiction over the subject matter of the purported action averted in the complaint.

Second Defense

Defendant alleges that the plaintiffs are not nor are any of them parties in interest under the provisions of paragraph (20) of Section 1 of the Interstate Commerce Act (Title 49 U. S. C. A., Section 1, Par. 20) and that said par-

ties are not nor are any of them authorized to institute or maintain any action thereunder.

Third Defense

The complaint fails to state a claim against defendant upon which relief can be granted.

[fol. 21] Fourth Defense

(a) Defendant denies all and singular the allegations of paragraph numbered "1" of the complaint.

(b) Defendant is without knowledge or information sufficient to form a belief as to the truth of the averments made in paragraph numbered "2" of the complaint.

(c) Defendant admits the allegations of paragraph numbered "3" of the complaint.

(d) Answering paragraph numbered "4" of said complaint defendant admits that the City of Kansas City, Kansas proposes to build and is now engaged in building a Food Terminal or Produce Market, consisting of wholesale dealers' unit and a farmers' food products market, on a tract of land owned by said City at or near the confluence of the Kansas (Kaw) and Missouri Rivers, to cost approximately $4,000,000.00, but denies that the defendant proposes to build or is now engaged in building said Food Terminal or Produce Market.

Defendant further admits that the City of Kansas City, Kansas has obtained a grant from the Public Works Administration of the United States of $1,710,000.00; that defendant has purchased from said City an issue of $3,000,000.00 principal amount of said City's 4% Public Levee Terminal Revenue Bonds, and that the proceeds of said bonds after providing for the retirement of outstanding Public Levee Revenue Bonds, together with the proceeds of said grant, will be used by said City in the construction of said Food Terminal or Produce Market.

(e) Defendant admits the allegations of subparagraph (a) of paragraph numbered "5" of the complaint.

(f) Defendant admits that it has leased from said City at an annual rental of $10,760.00 per year for a period of thirty years a tract of land containing an area of approximately twenty-five (25) acres, adjacent to said Produce

Market, but denies all and singular the other allegations of said subparagraph (b) of paragraph numbered "5".

Further answering said subparagraph (b) of paragraph numbered "5", defendant states that pursuant to the terms [fol. 22] of said lease defendant proposes to construct on said leased premises for convenient service to said Food Terminal certain team, spur, switching, or side tracks; that as a part of said Food Terminal the City of Kansas City, Kansas will construct industry tracks adjacent to and for the purpose of serving certain of the buildings included in said Food Terminal, which tracks the City of Kansas City, Kansas will connect with said trackage to be constructed by defendant under said lease. Defendant further alleges that pursuant to the provisions of said lease it has agreed to operate the industry tracks to be constructed by the City of Kansas City, Kansas, and that the cost to defendant of constructing said team, spur, switching, or side tracks, including the driveways to permit convenient access to and for loading and unloading cars on said team tracks, to be built by it, will approximate $500,000.00.

(g) Defendant denies all and singular the allegations of subparagraph (c) of paragraph numbered "5", except that it admits that carload shipments, including interstate shipments, when consigned to or from said produce terminal or to or from the team tracks to be constructed by the defendant, will be handled by it in switching movements over said trackage.

(h) Defendant denies all and singular the allegations of paragraph numbered "6" of the complaint.

Further answering said paragraph numbered "6" defendant alleges that the tracks to be constructed by the defendant pursuant to said lease consist of team tracks and switching tracks and a connection between said team and switching tracks and the defendant's existing line of railroad located immediately adjacent to and for many years serving the Public Levee of the City of Kansas City, Kansas and the industrial territory adjacent thereto; that the tracks to be constructed by the City of Kansas City, Kansas, pursuant to said lease, will be industrial or spur tracks connecting with the team tracks of the defendant; and that all of the tracks to be constructed or operated by the defendant pursuant to said lease will be located wholly within one state, to-wit, the State of Kansas; and that said tracks will

not, nor will any of them, constitute an extension or extensions of defendant's line or lines of railroad.

[fol. 23] (i) Answering paragraph numbered "7" of said complaint defendant denies all and singular the allegations therein contained, except that defendant admits that it has not obtained a certificate from the Interstate Commerce Commission that the present or future public convenience and necessity requires or will require the construction or operation or construction and operation of the tracks more particularly described in paragraphs (f) and (h) of the Fourth Defense of this answer, and defendant alleges that the Interstate Commerce Commission by virtue of the provisions of paragraph (22) of Section 1 of the Interstate Commerce Act (Title 49 U. S. C. A., Section 1, Par. 22) is without jurisdiction to grant any such certificate.

(j) Defendant denies all and singular the allegations of paragraph numbered "8" of said complaint.

(k) Answering paragraph "9" of the complaint defendant admits that it will construct and operate or operate the tracks more particularly described in paragraphs (f) and (h) of the Fourth Defense of this answer without making application for [an] obtaining from the Interstate Commerce Commission a certificate of public convenience and necessity.

Further answering said paragraph "9" defendant alleges that by virtue of paragraph (22), Section 1, of the Interstate Commerce Act (Title 49 U. S. C. A., Sec. 1, Par. 22) the Interstate Commerce Commission is without authority to grant a certificate of convenience and necessity respecting the construction and operation of said tracks and that the Interstate Commerce Commission is wholly without jurisdiction in the premises.

Further answering said paragraph numbered "9" of the complaint this defendant denies all and singular the allegations thereof not expressly admitted herein.

Wherefore, having fully answered said complaint defendant prays that the complaint be dismissed and that defend-
[fol. 24] ant have and recover of plaintiffs the costs of this action.

T. W. Bockes, 1416 Dodge St., Omaha, Nebraska,
Henry N. Ess, 1500 Dierks, Bldg., Kansas City,
Mo., Attorneys for Defendant.

Service of a copy of the within and foregoing answer is hereby acknowledged this 18th day of January, 1939, by Ruby D. Garrett, the undersigned attorney for plaintiffs.

Ruby D. Garrett, Fred Ruark, Attorneys for Plaintiffs.

[File endorsement omitted.]

IN UNITED STATES DISTRICT COURT

APPLICATION OF DEFENDANT TO HEAR DEFENSES ASSERTED AS FIRST, SECOND, AND THIRD DEFENSE, RESPECTIVELY, IN ITS ANSWER—Filed February 7, 1939

Comes Now the defendant and makes this application to the Court that the Court hear and determine before trial the following defenses raised in its answer, to-wit: First Defense, Second Defense, and Third Defense.

Wherefore, this defendant prays that the Court hear and determine said defenses in advance of the trial.

T. W. Bockes, Henry N. Ess, Attorneys for Defendant.

[File endorsement omitted.]

[fol. 25] IN UNITED STATES DISTRICT COURT

ORDER DENYING MOTION OF KANSAS CITY, MISSOURI, FOR LEAVE TO INTERVENE AND DISMISSING COMPLAINT—Filed March 3, 1939

For the reasons appearing in the memorandum opinion attached hereto, the motion of the City of Kansas City, Missouri, for leave to intervene is denied, and it is

Ordered, Adjudged And Decreed that plaintiffs' bill be and is hereby dismissed and the plaintiffs take nothing by reason therefor, and that the defendant be and is discharged with its costs.

J. C. Collet, District Judge.

Dated this 3rd day of March, 1939.

[File endorsement omitted.]

IN UNITED STATES DISTRICT COURT

DECREE—Filed March 3, 1939

This cause came on to be heard upon the application of the defendant duly filed, that the First Three Defenses in defendant's answer to the complaint be heard and determined before trial, and upon the motion of Kansas City, Missouri for leave to intervene as a plaintiff herein, and said application and said Defenses being submitted to the Court upon briefs and arguments of plaintiffs and defendant, and said motion for leave to intervene being submitted to the Court on briefs and arguments of the City of Kansas City, Missouri and the defendant. Upon consideration whereof the Court being fully advised in the premises,

It Is By The Court Considered, Ordered, Adjudged And Decreed:

1. That the application of the defendant be and it is hereby sustained.

2. That the Court has jurisdiction of the subject matter and the First Defense is hereby denied.

3. That plaintiffs are not, nor are any of them, parties in interest who may maintain this action; that the complaint fails to state a claim upon which any relief can be granted, and the defendant's Second and Third Defenses be and the same are hereby sustained.

[fol. 26] 4. That the City of Kansas City, Missouri is not a party in interest authorized to maintain or intervene in said action and the motion for leave to intervene of said City be and the same is hereby denied.

5. That the complaint be and the same is hereby dismissed at the costs of the plaintiffs.

Done this 3rd day of March, 1939.

J. C. Collet, United States District Judge.

[File endorsement omitted.]

IN UNITED STATES DISTRICT COURT

NOTICE OF APPEAL BY L. SINGER & SONS, ET AL.—Filed March 28, 1939

Notice is hereby given that L. Singer & Sons, a corporation; Wm. F. Helm, doing business as Wm. F. Helm Produce Company; Arthur Harris, doing business as Kansas City Fruit & Produce Company; Robert T. Kesting, doing business as H. Kesting Produce Company; Chester F. Urban, doing business as Maguire-Urban Commission Company; Fara D'Angelo, doing business as D'Angelo Celery House; R. E. Mills, doing business as Mills Produce Company; H. R. Raker, doing business as Raker Produce Company; Ralph Hurst; Ralph Hurst & Company, a corporation; Reuben Kaplan, doing business as Royal Food Stores; Earl J. Tranin; Merchants Bank Building & Investment Company, a corporation, and North Side Business & Improvement Association, a pro forma decree corporation, plaintiffs above named, hereby appeal to the Circuit Court of Appeals for the Eighth Circuit from that portion of the final decree or judgment entered in this action on March 3, 1939, reading as follows, to-wit:

"1. That the application of the defendant be and it is hereby sustained.

"3. That plaintiffs are not, nor are any of them, parties in interest who may maintain this action; that the complaint fails to state a claim upon which any relief can be granted, and the defendant's Second and Third Defenses be and the same are hereby sustained.

[fol. 27] "5. That the complaint be and the same is hereby dismissed at the costs of the plaintiffs."

Dated this 28th day of March, 1939.

Ruby D. Garrett, 822 Scarritt Bldg., Kansas City, Mo. Fred Ruark, 822 Scarritt Bldg., Kansas City, Mo. Spurgeon L. Smithson, 606 Commerce Building, Kansas City, Mo. Attorneys for above named appellants.

Copy of above notice mailed to Mr. Henry Ess, Attorney for defendant, March 28, 1939.

E. O'Keefe, Deputy Clerk.

[File endorsement omitted.]

IN UNITED STATES DISTRICT COURT

NOTICE OF APPEAL BY KANSAS CITY, MISSOURI—Filed March 31, 1939

Notice is hereby given that Kansas City, Missouri, a municipal corporation, applicant to intervene herein, as a party plaintiff, hereby appeals to the Circuit Court of Appeals for the Eighth Circuit from that portion of the final decree or judgment entered in this action on March 3, 1939, reading as follows, to-wit:

"4. That the City of Kansas City, Missouri is not a party in interest authorized to maintain or intervene in said action and the motion for leave to intervene of said City be and the same is hereby denied.

[fols. 28-29] "5. That the complaint be and the same is hereby dismissed at the costs of the plaintiffs".

Dated this 31st day of March, 1939

Fred Bellemere, City Counselor, 2800 City Hall, Kansas City, Mo. Marcy K. Brown, Assistant City Counselor, 2800 City Hall, Kansas City, Mo. Attorneys for Kansas City, Missouri, Applicant.

Received a copy of the foregoing Notice of Appeal this 31st day of March, 1939.

Watson, Ess, Groner, Barnett & Whittaker, Attorneys for Defendant Union Pacific Railroad Co.

Copy of the above notice of appeal mailed to Ruby D. Garrett, Attorney for plaintiffs, and to Watson, Ess, Groner, Barnett & Whittaker, Attorneys for Defendant, on March 31, 1939.

E. O'Keefe, Deputy Clerk.

[File endorsement omitted.]

[fol. 30] IN UNITED STATES DISTRICT COURT

MEMORANDUM OPINION—Filed March 3, 1939

Plaintiffs, alleging themselves to be engaged in or directly interested in or connected with, the business of buying and selling at wholesale and retail, fruits, vegetables and other

food products within and adjacent to the City Market of Kansas City, Missouri, seek to restrain the defendant, a railroad company, from constructing certain tracks, characterized in the complaint as "extensions", connecting defendant's present railway lines with a proposed new City Market about to be constructed in Kansas City, Kansas, not far from the present City Market of Kansas City, Missouri, without first obtaining a Certificate of Convenience and Necessity from the Interstate Commerce Commission authorizing the construction of the proposed new tracks. It is alleged that the proposed construction by defendant will destroy plaintiffs' business and investment, create a rural market without producing additional transportation business, result in unnecessary duplication of transportation facilities, unnecessarily divert transportation to defendant from other railroad companies, create destructive competition and result in needless expenditure of monies by defendant. For all of these reasons it is alleged that the property rights of plaintiffs and the general public will be adversely affected, a material change in the transportation situation created, and an unnecessary burden imposed upon interstate commerce.

The City of Kansas City, Missouri, has filed a motion requesting leave to intervene as a party plaintiff upon the ground that it is entitled to jointly maintain this action as a "party in interest" under the Act of February 4, 1887, 24 Stat. 379, entitled "An Act to Regulate Commerce" as amended by the Interstate Commerce Act of February 28, 1920, c. 91, par. 444, U. S. C. A. Title 49, Sec. 1, par. 20, and the Judicial Code Secs. 212, 213 as amended (Title 28 U. S. C. A. Sec. 45a). The motion to intervene alleges movant is actually interested in the subject matter of this proceeding because it has voted one-half million dollars in bonds for the construction of a new City Market now under construction and which will be injuriously affected by the establishment and construction of the new City Market in Kansas City, Kansas, and the construction to it by defendant of the so-called unauthorized railway "extensions". [fol. 31] It is further alleged that defendant's threatened action to construct the unauthorized extensions will divert much business from many old and prosperous businesses located at the Kansas City, Missouri, City Market with great pecuniary loss to those business establishments, loss in real estate values, loss in tax revenues to movant and loss

of convenient accessibility to a City Market by the citizens of Kansas City, Missouri.

The defendant has, by answer, (1) challenged the jurisdiction of this court over the subject matter of the action, (2) challenged plaintiffs' capacity to maintain this action as "parties in interest" under Sec. 1, par. 20, supra, and (3) challenged the sufficiency of the complaint to state a claim against defendant upon which the relief prayed for may be granted. By appropriate motion, defendant requests a ruling on these three above stated defenses in advance of a trial on other issues. Defendant also objects to the granting of leave to the City of Kansas City, Missouri, to intervene upon the ground, among others, that the City is not a "party in interest" within the meaning of Sec. 1, par. 20, supra.

The complaint and motion to intervene disclose that neither plaintiffs, nor the City of Kansas City, Missouri, are engaged in the transportation business. It further appears that neither the property or confines of either are touched, encroached upon or directly affected by the proposed construction of the so-called "extensions". There is no violation of any definite legal right alleged. Therefore, neither plaintiffs nor the City of Kansas City, Missouri, may maintain this action. Western Pacific Cal. R. R. Co. vs. So. Pac. Co., 284 U. S. 47, Texas & Pac. Ry. Co. vs. Gulf, Colo. & S. F. Ry. Co., 270 U. S. 266, Claiborne-Annapolis Ferry vs. U. S., 285 U. S. 382, Texas etc. R. R. Co. vs. Northside Ry. Co., 276 U. S. 469.

Since neither the United States, the Interstate Commerce Commission, the Public Service Commission of Missouri or Kansas, or any party directly interested is a party plaintiff to this action it may not be maintained and must be dis-[fol. 32] missed and the motion to intervene denied. (Sec. 1, par. 20, Title 49, U. S. C. A., supra).

J. C. Collet, District Judge.

Dated this 3rd day of March, 1939.

[File endorsement omitted.]

Clerk's Certificate to foregoing transcript omitted in printing.

IN UNITED STATES CIRCUIT COURT OF APPEALS, EIGHTH CIRCUIT

[Title omitted]

STATEMENT OF POINTS ON APPEAL OF L. SINGER & SONS et al. —Filed May 8, 1939

[fol. 33] Come now the above named plaintiffs, appellants, and pursuant to the provisions of Rule 24 of this Honorable Court, file the following statement of points upon which they will rely upon their appeal from the decree of the Honorable District Court of the United States for the Western Division of the Western District of Missouri.

I

The court below erred in sustaining defendant's application to hear and determine before trial the second defense set forth in defendant's answer, reading as follows:

"Defendant alleges that the plaintiffs are not nor are any of them parties in interest under the provisions of paragraph (20) of Section 1 of the Interstate Commerce Act (Title 49 U. S. C. A. Section 1, Par. 20) and that said parties are not nor are any of them authorized to institute or maintain any action thereunder.",

for the reason that said second defense is not one of the enumerated defenses which, under paragraphs (b) and (d) of Rule 12 of Rules of Civil Procedure for the District Courts of the United States, may be heard and determined before trial.

II

The court below erred in hearing and determining before trial the second defense set forth in defendant's answer, reading as follows:

[fol. 34] "Defendant alleges that the plaintiffs are not nor are any of them parties in interest under the provisions of paragraph (20) of Section 1 of the Interstate Commerce Act (Title 49 U. S. C. A. Section 1, Par. 20) and that said parties are not nor are any of them authorized to institute or maintain any action thereunder.",

for the reason that said second defense is not one of the enumerated defenses which, under paragraphs (b) and (d) of Rule 12 of Rules of Civil Procedure for the District Courts of the United States, may be heard and determined before trial.

III

The court below erred in considering, ordering, adjudging and decreeing that plaintiffs are not, nor are any of them parties in interest who may maintain this action because under the allegations of the Complaint the plaintiffs (appellants) are parties in interest and authorized and entitled to institute and maintain this action under the laws of the United States, and particularly the provisions of paragraph (20) of Section 1 of the Interstate Commerce Act (Title 49 U. S. C. A. Sec. 1, Par. 20).

IV

The court below erred in considering, ordering, adjudging and decreeing that the Complaint fails to state a claim upon which any relief can be granted, for the reason that said Complaint states a good cause of action and a claim on which relief can be granted under the laws of the United States and particularly under the provisions of the Interstate Commerce Act (Title 49, U. S. C. A., Sec. 1, Paragraphs 18 to 21, inclusive).

V

The court below erred in dismissing plaintiffs' complaint at plaintiffs' costs for the reason that said complaint states a good cause of action and a claim upon which relief can be granted under the laws of the United States and particularly the Interstate Commerce Act (Title 49, U. S. C. A., Sec. 1, Paragraphs 18 to 21, inclusive).

[fol. 35] Wherefore, appellants, jointly and severally, pray that the decree herein may be reversed.

Ruby D. Garrett, 822 Scarritt Bldg., Kansas City, Missouri; Fred Ruark, 822 Scarritt Bldg., Kansas City, Missouri; Spurgeon L. Smithson, 606 Commerce Building, Kansas City, Missouri.

[File endorsement omitted.]

IN UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT

[Title omitted]

STATEMENT OF THE POINTS ON WHICH APPELLANT KANSAS CITY, MISSOURI, INTENDS TO RELY AND OF THE PARTS OF THE RECORD WHICH SAID APPELLANT THINKS NECESSARY FOR THE CONSIDERATION THEREOF—Filed May 10, 1939

Comes now Kansas City, Missouri, a Municipal Corporation, Appellant herein and in conformity with Rule 24, of the Court, states that Appellant Kansas City, Missouri, a Municipal Corporation, intends to rely upon the contentions that the District Court of the United States for the Western Division of the Western District of Missouri erred in this cause:

(1) In denying the right of this Appellant to intervene and in denying its motion for leave to intervene on the [fol. 36] ground that the motion to intervene as a plaintiff by Kansas City stated no facts sufficient to justify the relief asked therein because said Kansas City, Missouri, a Municipal Corporation was not a party in interest within the provisions of the Act of February 24, 1887, 24 Stat. 379, entitled, "An Act to Regulate Commerce" as amended by the Interstate Commerce Act of February 28, 1920, 41 Stat. 456, U. S. C. A. entitled "49 Sec. 1, paragraphs 18 to 21 inclusive" because upon the allegations of said motion to intervene as a plaintiff and the intervening petition of Kansas City filed therewith, sufficient allegations are contained therein to state grounds for its requested intervention and to constitute it a party in interest entitled to the relief prayed within the terms of said statutes.

(2) In holding and denying the right of this Appellant to maintain the cause of action set forth in plaintiff's petition and in this Appellant's motion to intervene as a party plaintiff and its intervening petition filed therewith on the ground that Kansas City, Missouri, a Municipal Corporation was not a party in interest within the provisions of the Act of

February 24, 1887, 24 Stat. 379, entitled, "An Act to Regulate Commerce" as amended by the Interstate Commerce Act of February 28, 1920, 41 Stat. 456, U. S. C. A. entitled "49 Sec. 1, paragraphs 18 to 21 inclusive" because upon the allegations of said motion to intervene as a plaintiff and the intervening petition of Kansas City filed therewith, sufficient allegations are contained therein to state grounds for its right to maintain such an action and to constitute it a party in interest entitled to the relief prayed within the terms of said statutes.

(3) In dismissing the Bill of Complaint of plaintiff L. Singer and Sons, a corporation, et al., for the reason that said Bill of Complaint states facts sufficient to constitute a cause of action and to make said plaintiffs parties in interest within the meaning of said hereinbefore quoted statutes.

(4) In the rendition of the final decree in this cause filed and entered March 3, 1939, the Appellant Kansas City, Missouri deems the entire record as filed to be necessary for [fols. 37-40] the consideration of the contentions above enumerated and prays that said order and decree be reversed.

Fred Bellemere, City Counselor; Marcy K. Brown, Jr., Assistant City Counselor, 2800 City Hall, Kansas City, Missouri, Attorneys for Appellant, Kansas City, Missouri.

Service of a copy of the foregoing statement of points is hereby acknowledged on behalf of the Appellee this 8th day of May, 1939.

T. W. Bockes, Henry N. Ess, Attorney for Appellee.

Service of a copy of the foregoing statement of points is hereby acknowledged on behalf of L. Singer & Sons, a corporation, et al., Appellants, this 8th day of May, 1939.

Ruby D. Garrett, Fred Rauk, Spurgeon L. Smithson, Attorneys for Appellants, L. Singer & Sons, et al.

[File endorsement omitted.]

[fol. 41] IN UNITED STATES CIRCUIT COURT OF APPEALS, EIGHTH CIRCUIT

No. 11480

L. SINGER & SONS et al., Appellants,

vs.

UNION PACIFIC RAILROAD COMPANY

Appeal from the District Court of the United States for the Western District of Missouri

ORDER OF SUBMISSION—November 7, 1939

This cause having been called for hearing in its regular order, argument was commenced by Mr. Ruby D. Garrett for appellants, continued by Mr. Henry N. Ess for appellee, [fol. 42] and concluded by Mr. Ruby D. Garrett for appellants.

Thereupon, this cause was submitted to the Court on the transcript of the record from said District Court and the briefs of counsel filed herein.

IN UNITED STATES CIRCUIT COURT OF APPEALS, EIGHTH CIRCUIT

No. 11489

KANSAS CITY, MISSOURI, a Municipal Corporation, Appellant,

vs.

L. SINGER & SONS, a Corporation, et al.

Appeal from the District Court of the United States for the Western District of Missouri

ORDER OF SUBMISSION—November 7, 1939

This cause having been called for hearing in its regular order, by agreement of counsel in open Court, the same is submitted to the Court without oral argument on the transcript of the record from said District Court and the briefs of counsel filed herein.

[fol. 43] IN UNITED STATES CIRCUIT COURT OF APPEALS, EIGHTH CIRCUIT

No. 11,480—NOVEMBER TERM, A. D. 1939

L. SINGER & SONS, a Corporation, et al., Appellants,

vs.

UNION PACIFIC RAILROAD COMPANY, a Corporation, Appellee

Appeal from the District Court of the United States for the Western District of Missouri

No. 11,489—NOVEMBER TERM, A. D. 1939

KANSAS CITY, MISSOURI, a Municipal Corporation, Appellant,

vs.

L. SINGER & SONS, a Corporation, et al., Appellees

Appeal from the District Court of the United States for the Western District of Missouri

Mr. Ruby D. Garrett (Mr. Fred Ruark and Mr. Spurgeon L. Smithson were with him on the brief) for Appellants, Case No. 11,480.

Mr. Henry N. Ess (Mr. T. W. Bockes and Messrs. Watson, Ess, Groner, Barnett & Whittaker were with him on the brief) for Appellee, Case No. 11,480.

[fol. 44] Mr. Sam C. Blair, City Counselor, and Mr. Marcy K. Brown, Jr., Assistant City Counselor, filed a brief for Appellant, Case No. 11,489.

Mr. T. W. Bockes, Mr. Henry N. Ess, and Messrs. Watson, Ess, Groner, Barnett & Whittaker filed a brief for Appellee Union Pacific Railroad Company, Case No. 11,489.

Before Stone, Gardner, and Sanborn, Circuit Judges

OPINION—February 7, 1940

SANBORN, Circuit Judge, delivered the opinion of the Court:

The suit (No. 11,480) which gives rise to these apepals was brought by certain commission merchants of Kansas City, Missouri, to enjoin the Union Pacific Railroad Company from constructing what is alleged to be an extension of its

lines of railway in Kansas City, Kansas, until such time as it has procured a certificate of convenience and necessity from the Interstate Commerce Commission covering such construction, as required by § 402, par. (18), of the Transportation Act of 1920 [c. 91, 41 Stat. 456, 477; 49 U. S. C. § 1, par. (18)]. Kansas City, Missouri, sought leave to intervene. The railroad company filed an answer in which, among other things, it (1) denied jurisdiction; (2) asserted that the plaintiffs were not "parties in interest" within the meaning of § 402, par. (20), of the Transportation Act [c. 91, 41 Stat. 456, 478; 49 U. S. C. § 1, par. (20)]; and (3) asserted that the complaint failed to "state a claim against defendant upon which relief can be granted".[1] Thereafter the defendant railroad company applied for a hearing upon these defenses before trial.[2] The District Court heard its application together with the motion of Kansas City, Missouri, for leave to intervene. The court ruled that it had jurisdiction of the suit, but that the plaintiffs were not "parties in interest" and hence could not maintain it, and that the complaint failed to state a claim upon which relief could be granted. It also ruled that the City was not a "party in [fol. 45] interest".[3] It entered a decree dismissing the complaint and denying intervention. From this decree these appeals are taken.

The appeals challenge (1) the action of the court in considering in advance of trial the defenses sustained; (2) the ruling that the plaintiffs and the City are not "parties in interest"; and (3) the ruling that the complaint fails to state a claim upon which relief can be granted.

We think that, if it conclusively appears from the complaint filed by the plaintiffs and the complaint in intervention tendered by the City that the plaintiffs and the City are without capacity to maintain the suit and that therefore no relief could be afforded them, the court below was justified in entering a decree of dismissal in advance of trial. See General Investment Co. v. New York Central R. Co., 271 U. S. 228, 230; Carolina Power & Light Co. v. South Carolina Public Service Authority, 4 Cir., 94 F. 2d 520,

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[1] Rules of Civil Procedure for the District Courts of the United States, Rule 12 (b) (6).

[2] Ibid., Rule 12 (d).

[3] 26 F. Supp. 721.

526; Leimer v. The State Mutual Life Assurance Co., 8 Cir., (opinion filed January 5, 1940), — F. 2d —.

The vital question in these cases is whether the plaintiffs and the City are "parties in interest" within the meaning of paragraph (20), § 402 of the Transportation Act, which provides:

"Any construction [of an extension] * * * contrary to the provisions of this paragraph or of paragraph (18) or (19) of this section may be enjoined by any court of competent jurisdiction at the suit of the United States, the commission [Interstate Commerce Commission], any commission or regulating body of the State or States affected, or any party in interest; * * *."

The complaint of the plaintiffs shows that they are commission merchants doing business on the Kansas City, Missouri, produce market, an old and well-established market which adequately serves the consuming public in its vicinity and receives produce from, and ships produce to, other states; that Kansas City, Missouri, is now engaged in constructing new market buildings for this market at a cost of about $500,000; that the market has suitable and adequate transportation facilities of all kinds; that the adjoining city of Kansas City, Kansas, proposes to build and is building a "Food Terminal" or produce market on a tract of land which it owns, at a cost of about $4,000,000, of which [fol. 46] $1,710,000 is a grant from the Public Works Administration of the United States, and that the balance of the necessary funds will be procured by a sale of the City's bonds to the defendant railroad company; that the defendant proposes, at an expense of some $500,000, to furnish trackage to serve this Kansas City, Kansas, market; that this trackage constitutes an extension of the defendant's lines of railroad, for the construction of which it has procured no certificate of convenience and necessity from the Interstate Commerce Commission as required by law; that the construction and operation of the proposed extension in Kansas City, Kansas, will adversely affect and will destroy the business and properties of the plaintiffs and the large investments which they have made in and adjacent to the Kansas City, Missouri, produce market; that it will create an unnecessary and uncalled for rival market at an inconvenient place without creating any more produce to be han-

dled or any more customers to be served; that it will result in the unnecessary duplication of railroad facilities at a cost of $500,000 without increasing the amount of freight to be handled; that it will divert traffic from other railroads which are now adequately handling the traffic to the Kansas City, Missouri, produce market, and will cause destructive competition between the defendant and other railroads and will cause a wasteful and needless expenditure of money by the defendant; that "for each and all of the reasons aforesaid, the construction and operation, or the construction, or the operation of the said extension or extensions of railroad by the defendant to said proposed produce market in Kansas City, Kansas, will directly and adversely affect the property interests of the plaintiffs and the public generally by bringing about a material change in the transportation situation, and will constitute an unnecessary burden upon interstate commerce directly and adversely affecting the welfare of plaintiffs and the public interest."

It is obvious that the only basis for the plaintiffs' claim that the alleged extension of the lines of the defendant to the Kansas City, Kansas, market will particularly injure them is that they do business upon the Kansas City, Missouri, market, and that if the proposed rival market in Kansas City, Kansas, functions, it will divert business from the market upon which they operate and will thus hurt them, [fol. 47] their business, and their investments in Kansas City, Missouri, and that, since the proposed extension of its tracks by the defendant is necessary to enable the rival market to function, such extension will therefore injure the plaintiffs. It seems equally obvious that, except for the fact that the proposed extension is essential to the operation of the rival market in Kansas, it could not possibly have any direct or immediate effect upon the plaintiffs, their property or their business in Missouri, other than the effect which a wasteful expenditure by the defendant of its money would have upon the public generally. The proximate cause of the injury to the plaintiffs will be the competition created by the construction and operation of the rival market, and not the construction or operation of the transportation facilities furnished to it by the defendant or by others engaged in the transportation business.

It is the plaintiffs' contention that any one whose welfare is adversely affected or threatened by the unauthorized ex-

tention of a railroad is a "party in interest" who may maintain such a suit as this.[4] The defendant, on the other hand, contends broadly that no one is a "party in interest" who cannot point to the violation of some legal duty owing by the railroad to him.[5]

We concern ourselves only with the question whether the plaintiffs and Kansas City, Missouri, are "parties in interest" within the meaning of the statute authorizing "any party in interest" to maintain such a suit. This question, we think, is to be determined from the language of the Supreme Court of the United States in Western Pacific California Railroad Co. v. Southern Pacific Co., 284 U. S. 47, where the question was whether a railroad corporation without a railroad, but which had located its proposed line and had applied for authority to build it, was a "party in interest" within the meaning of the Transportation Act so [fol. 48] that it might maintain a suit to enjoin an unauthorized extension into the territory which its proposed line was intended to serve. The Court, after quoting from Texas & Pacific Ry. Co. v. Gulf, Colorado & Santa Fe Ry. Co., 270 U. S. 266, 277, said (p. 51 of 284 U. S.):

"The Texas & Pacific Ry. sought to prevent an unauthorized competitor from building an extension into territory already served by it. Prior to the statute, it could not have maintained such a suit, since the competitor's proposed action did not threaten interference with any legal right.

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[4] The plaintiffs rely upon: Western Pacific California R. Co. v. Southern Pacific Co., 284 U. S. 47; Detroit & M. Ry. Co. v. Boyne City, G. & A. R. Co. (D. C.) 286 F. 540; Claiborne-Annapolis Ferry Co. v. United States, 285 U. S. 382.

[5] The defendant relies upon: Alabama Power Co. v. Ickes, 302 U. S. 464; United States ex rel. New York Warehouse, Wharf & Terminal Ass'n v. Dern, (App. D. C.), 68 F. 2d 773; Moffat Tunnel League v. United States, 289 U. S. 113; Edward Hines Yellow Pine Trustees v. United States, 263 U. S. 143; Carolina Power & Light Co. v. South Carolina Public Service Authority, 4 Cir., 94 F. 2d 520; West Tennessee Power & Light Co. v. City of Jackson, 6 Cir., 97 F. 2d 979; Tennessee Electric Power Co. v. Tennessee Valley Authority, 306 U. S. 118; Railroad Co. v. Ellerman, 105 U. S. 166; Interstate Commerce Commission v. C., R. I. & P. Ry. Co., 218 U. S. 88; St. Louis Southwestern Railway Co. v. Missouri Pacific R. Co., 289 U. S. 76.

No carrier could then demand exemption from honest competition.

"If, as the court below seems to have assumed, a 'party in interest' must possess some clear legal right for which it might ask protection under the rules commonly accepted by courts of equity, the paragraphs under consideration would not materially aid the Congressional plan for promoting transportation. On the other hand, there was no purpose to permit any individual so inclined to institute such a proceeding. The complainant must possess something more than a common concern for obedience to law. See Massachusetts v. Mellon, 262 U. S. 447, 488. It will suffice, we think, if the bill discloses that some definite legal right possessed by complainant is seriously threatened or that the unauthorized and therefore unlawful action of the defendant carrier may *directly* and *adversely* affect the complaint-'s welfare by bringing about some material change in the transportation situation. Here, the petitioner was peculiarly concerned; its own welfare was seriously threatened. It alleged the beginning of an unlawful undertaking by a carrier which might prove deleterious to it as well as to the public interest in securing and maintaining proper railroad service without undue loss. It relied upon the procedure prescribed by the statute to secure an orderly hearing and proper determination of the matter. The disclosures of the bill were enough to show that the respondent's intended action might *directly* and seriously affect the project which complainant was undertaking in good faith. There was enough to give the latter the standing of a 'party in interest' within intendment of the Act." [Emphasis ours.]

The plaintiffs have no definite legal right which is threatened. They are, however, persons whose welfare may be [fol. 49] adversely affected by the bringing about of a material change in the transportation situation, in the sense that the extension proposed by the defendant, if built and operated, will enable a competitive market to function to their detriment. In that sense, we think it may safely be said that the proposed extension of defendant's lines may adversely affect the plaintiffs' welfare. We are of the opinion, however, that their complaint discloses that their welfare cannot be directly, but only indirectly and consequentially, affected by the proposed extension. They are not in com-

petition with the defendant. They are not engaged in the transportation business. Their only peculiar interest in that business is in the effect which changes in it may have upon the market where they do business and upon rival markets now or hereafter established in the territory which the plaintiffs serve.

A contention somewhat analogous to that here presented by the plaintiffs was ruled upon by this Court in Arkansas-Missouri Power Co. v. City of Kennett, 78 F. 2d 911, in which the power company sought to attack the validity of a loan and grant made by the United States to the City of Kennett to enable it to enter into competition with the power company. We said (p. 914):

"The court below was of the opinion that the power company was in no position to question the power of the federal government to loan or give money to the city of Kennett. We are in accord. The United States is not proposing to become a competitor of the power company. It will have no right, title, or interest in the plant when completed and nothing to do with operating it. The destruction of the power company's property will come about by reason of the city's operation of the plant when erected. The position of the United States is that of a lender of money, a buyer of bonds, and a giver of gifts. True, the money procured from the government will enable the city to build the plant, and, if the city builds the plant, it will no doubt operate it, and when it does operate the plant the city will take the customers of the power company, and the company's property in Kennett will become worthless or greatly impaired in value. We know of no rule of law, however, which permits one indirectly hurt, no matter how seriously, by a government expenditure, to question the power of the government to make it. In fact, the rule is to the contrary. Common- [fol. 50] wealth of Massachusetts v. Mellon, Secretary of the Treasury, et al., 262 U. S. 447, 43 S. Ct. 597, 67 L. Ed. 1078; City of Allegan, Mich., v. Consumers' Power Co. (C. C. A. 6), 71 F. 2d 477 (certiorari denied, 293 U. S. 586, 55 S. Ct. 100, 79 L. Ed. * * *). It is true that in the cases cited the plaintiffs relied upon their status as taxpayers exclusively, while in this case the plaintiff relies, in addition, upon the injury which will be done to its property by municipal competition. That injury, however, is, so far as the government is concerned, clearly consequential and indirect, as we have

pointed out. See, also, Missouri Utilities Co. v. City of California, Mo., et al., (D. C., W. D. Mo.) 8 F. Supp. 454, 465."

See, also, Moffat Tunnel League v. United States, 289 U. S. 113, 119-121; Pittsburgh & West Virginia Ry. Co. v. United States, 281 U. S. 479, 487; People v. Walsh, (Ill.) 174 N. E. 881, 882.

The complaint in intervention tendered by Kansas City, Missouri, shows that with respect to the proposed extension it stands in substantially the same position as the plaintiffs. Its market place will be injured by the establishment of the rival market, and taxable values in the City will decline with a resulting loss of revenue. The proposed extension, however, can only be the remote cause of the injuries which the City fears.

We realize that the meaning of the words "party in interest" as used in § 402, paragraph (20), of the Transportation Act might be expanded so as to include parties standing in the situation of these plaintiffs and of Kansas City, Missouri. We think that as yet persons in their situation have not been regarded as being "parties in interest" who may maintain a suit such as this. We conclude that the statute is not to be so liberally construed as to enable those who fear adverse effects upon their business from the establishment of competitive enterprises requiring transportation facilities, to maintain suits to enjoin railroads from constructing what are claimed to be unauthorized extensions to serve such enterprises.

The decree is Affirmed.

[fol. 51] DISSENTING OPINION

STONE, Circuit Judge, dissenting:

I am unable to concur in the able opinion of the majority on the issue as to whether plaintiffs and the proposed intervener are "parties in interest" within the meaning of the Act (U. S. C. A. Title 49, Section 1, par. 20). I am constrained to state the grounds for such dissent not only by the need for justifying a dissent from the views of Judges for whose judgment I have the highest respect, but also by what I conceive to be the importance of this decision to the

efficient operation of the provision of this Act requiring certificates of convenience and necessity before extensions of railway trackage are permissible (U. S. C. A. Title 49, Section 1, par. 18).

The Transportation Act was designed to place the interstate railroads "more completely than ever under the fostering guardianship and control of the [Interstate Commerce] Commission" by placing under its supervision various specified matters, among which is construction or abandonment of lines (Railroad Commission v. Southern Pacific Co., 264 U. S. 331, 341-342; Dayton-Goosecreek Ry. Co. v. United States, 263 U. S. 456, 478). The importance of this control over extensions or abandonments to realization of the purposes of the Act is obvious.

As to extension or abandonment of lines, this control of the Commission is exercised solely through the Act requirement of certificates of convenience and necessity before such extensions or abandonments are made. The means provided by the Act to force compliance with this control is by giving to "any party in interest" the right to prevent, by injunction, such extension or abandonment until the necessary certificate is obtained. This is the "only remedy" and such remedy is "both affirmative and complete" (Texas & Pac. Ry. Co. v. Gulf, Colorado & Santa Fe Ry. Co., 270 U. S. 266, 273). Since the above is the only method of protecting and making fully effective this control of the Commission, the importance of any definition of "party in interest"—those who may initiate such procedure—is evident.

As shown by the petition, the "interest" of the plaintiffs is as follows. Defendant contemplates the construction of certain trackage in Kansas City, Kansas, which plaintiffs allege is an "extension", within the meaning of the Act. [fol. 52] This trackage is to serve a large produce market which is to be constructed by Kansas City, Kansas. Plaintiffs are produce merchants who own or have places of business in connection with a long established similar market in Kansas City, Missouri, which has long adequately served the area made up of and surrounding the two cities. The construction and operation of the proposed trackage would have the injurious effects following: (a) destroy or seriously and adversely affect the businesses, properties and large financial investments of plaintiffs in and adjacent to the existing Kansas City, Missouri, produce market; (b)

create a rival market far removed from the center of population and inconvenient to a great majority of the citizens of the two cities; (c) create a rival market with no increase of produce business when the present market is entirely adequate to serve the entire community; (d) result in an unnecessary duplication of railroad facilities at a cost of over $500,000.00 with no increase in freight to be handled; (e) divert traffic to defendant from other railroads which are now adequately handling the traffic to the existing produce market; (f) cause destructive competition between railroads operating in the vicinity; and (g) result in wasteful and needless expenditures by defendant.

No present purpose is served by examining, separately, the just stated allegations as to injury. It is enough to test the issue of "interest" by the position of the plaintiffs to this extension as alleged in the petition. That position is that the proposed trackage will divert business from a long established market to the financial loss of plaintiffs and that such diversion will serve no purpose useful to the communities affected thereby. The question is whether "party in interest" (within the meaning of this Act) includes those who will suffer financial loss by a change in conditions which will be brought about by the construction and operation of an extension of a railroad for which no certificate has been obtained under the Act?

Plaintiffs contend broadly that any one whose "welfare" is adversely affected by a railroad extension is a "party in interest". Defendant contends broadly that "party in interest" is confined to one asserting "the violation of a legal duty owing by the defendant [railroad] to him" and [fol. 53] that damage which springs solely from a change in competitive conditions brought about by an "extension" gives rise to no legal duty but is damnum absque injuria.

I think both contentions are, broadly, incorrect and that the meaning of the Act is to be found between these extremes.

The contention of defendant is that the Act intended that only such persons might seek this injunctive relief as could show a violation of some legal duty owing to them by the railroad proposing the extension. This contention is destroyed by the language, construing the provision of the Act, in Western Pacific California Railroad Co. v. Southern Pacific Co., 284 U. S. 47, 51-52, where, after quoting from

Texas & Pacific Ry. Co. v. Gulf, Colorado & Santa Fe Ry. Co., 270 U. S. 266, 277, the Court said:

"The Texas & Pacific Ry. sought to prevent an unauthorized competitor from building an extension into territory already served by it. Prior to the statute, it could not have maintained such a suit, since the competitor's proposed action did not threaten interference with any legal right. No carrier could then demand exemption from honest competition.

If, as the court below seems to have assumed, a 'party in interest' must possess some clear legal right for which it might ask protection under the rules commonly accepted by courts of equity, the paragraphs under consideration would not materially aid the Congressional plan for promoting transportation. On the other hand, there was no purpose to permit any individual so inclined to institute such a proceeding. The complainant must possess something more than a common concern for obedience to law. See Massachusetts v. Mellon, 262 U. S. 447, 488. It will suffice, we think, if the bill discloses that some definite legal right possessed by complainant is seriously threatened or that the unauthorized and therefore unlawful action of the defendant carrier may directly and adversely affect the complainant's welfare by bringing about some material change in the transportation situation. Here, the petitioner was peculiarly concerned; its own welfare was seriously threatened. It alleged the beginning of an unlawful undertaking by a carrier which might prove deleterious to it as well as to the public interest in securing and maintain-[fol. 54] ing proper railroad service without undue loss. It relied upon the procedure prescribed by the statute to secure an orderly hearing and proper determination of the matter. The disclosures of the bill were enough to show that the respondent's intended action might directly and seriously affect the project which complainant was undertaking in good faith. There was enough to give the latter the standing of a 'party in interest' within intendment of the Act."

This quotation not only carries the meaning of "party in interest" beyond the protection of legal rights but expressly recognizes that injury through competition—not theretofore subject to legal remedy—might be, and in that case was, sufficient basis to constitute the one so injured

such a "party in interest". The decisions cited by appellee to the effect that equity affords no remedy for injuries arising solely from competitive conditions or changes therein are inapplicable. The matter here is one of statutory construction and not one of general law.

The contention of appellant that any one whose "welfare" is affected by a track "extension" is a "party in interest" seems rather too broad. The above quotation from the Western Pacific California case contains the generally stated limitations of the meaning of the statutory term as well as an application of such definition to a set of facts useful in the case before us. The Court states two general classes of persons as within the definition, towit, those having some definite legal right seriously threatened or those whose "welfare" "may be directly and adversely" affected "by bringing about some material change in the transportation situation."

The latter class was involved in that case as it is in the case before us. The main, apparently the only, direct and adverse effect upon the plaintiff in that case was that of competition through the trackage contemplated by the Southern Pacific (p. 52). This effect was, obviously, a business—a financial—effect. Such an effect was "something more than a common concern for obedience to law" (Western Pacific California case, supra, p. 51). Without attempting further to define that "welfare" which, if "directly and adversely" affected, brings one within the Act, it is sufficient for our present purposes that direct financial loss is within the Act. Such financial loss is clearly [fol. 55] stated in this petition and might naturally result from the situation pleaded therein. I think the plaintiffs stated enough in the petition to give them the standing of a "party in interest" within the intendment of the Act.

As to appellant Kansas City, Missouri, the allegation of financial loss is in taxes through diminution of real property values and possible movement of the present produce merchants from the city to the vicinity of the contemplated market in Kansas City, Kansas. Also loss through the situation that it is now erecting a new market structure at considerable cost. It seems to me these allegations are of sufficient definite and adverse financial effect to bring the city within the statute.

I cannot agree that the proposed extension by defendant does not directly affect complainants and intervener. It

is quite evident from the complaint and from the offered intervening petition (1) that plaintiffs and intervener will be financially affected by the proposed rival market; and (2) that such rival market cannot come into existence without this extension by defendant.

It is true that the law furnishes no protection against competition of a rival market. It is equally true that the Act places it in the power of the Commission to refuse a certificate for an extension where the natural and intended effect of such extension is to create a rival market which will serve no useful public purpose and which will result in direct financial loss to an existing market. Such effects certainly "affect the complainant's welfare by bringing about some material change in the transportation situation", as stated in the foregoing quotation from the Western Pacific California case.(1)

[fol. 56] IN UNITED STATES CIRCUIT COURT OF APPEALS, EIGHTH CIRCUIT

No. 11480

L. SINGER AND SONS, a Corporation; WM. F. HELM, Doing Business as Wm. F. Helm Produce Company; Arthur Harris, Doing Business as Kansas City Fruit and Produce Company; Robert T. Kesting, Doing Business as H. Kesting Produce Company; Chester F. Urban, Doing Business

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(1) In present this bill, Chairman Esch of the House Committee on Interstate and Foreign Commerce said:

"Before a road or an extension thereof can be built it must get what is called in this bill a certificate of convenience or necessity from the commission as a condition precedent to the building of a single rod of the extension or of the new line. That means that the commission must first investigate the situation. It must first consult the communities that would be connected or would be located on the proposed line. It must consult the *shipping interests and the producing interests and all other interests that might be involved* and then determine whether or not it should issue a certificate of convenience and necessity." (Italics supplied.)

as Maguire-Urban Commission Company; Fara D'Angelo, Doing Business as D'Angelo Celery House; R. E. Mills, Doing Business as Mills Produce Company; H. R. Raker, Doing Business as Raker Produce Company; Ralph Hurst; Ralph Hurst and Company, a Corporation; Reuben Kaplan, Doing Business as Royal Food Stores; Earl J. Tranin; Merchants Bank Building and Investment Company, a Corporation, and North Side Business and Improvement Association, a Pro Forma Decree Corporation, Appellants,

vs.

UNION PACIFIC RAILROAD COMPANY, a Corporation

No. 11489

KANSAS CITY, MISSOURI, a Municipal Corporation, Appellant,

vs.

L. SINGER AND SONS, a Corporation; WM. F. HELM, Doing Business as Wm. F. Helm Produce Company; Arthur Harris, Doing Business as Kansas City Fruit and Produce Company; Robert T. Kesting, Doing Business as H. Kesting Produce Company; Chester F. Urban, Doing Business as Maguire-Urban Commission Company; Fara D'Angelo, Doing Business as D'Angelo Celery House; R. E. Mills, Doing Business as Mills Produce Company; H. R. Raker, Doing Business as Raker Produce Company; [fols. 57-61] Ralph Hurst; Ralph Hurst and Company, a Corporation; Reuben Kaplan, Doing Business as Royal Food Stores; Earl J. Tranin; Merchants Bank Building and Investment Company, a Corporation; North Side Business and Improvement Association, a Pro Forma Decree Corporation, and Union Pacific Railroad Company, a Corporation

Appeals from the District Court of the United States for the Western District of Missouri

DECREE—February 7, 1940

These causes came on to be heard on the transcript of the record from the District Court of the United States for the Western District of Missouri, and were argued by counsel.

On Consideration Whereof, It is now here ordered, adjudged, and decreed by this Court, that the decree of the said District Court, in these causes, be, and the same is hereby, affirmed, without the taxation of costs in favor of either of the parties in this Court.

[fol. 62] Clerk's Certificate to foregoing transcript omitted in printing.

[fol. 63] IN SUPREME COURT OF THE UNITED STATES

STIPULATION TO OMIT FROM RECORD NONESSENTIAL MATTERS, AS PROVIDED BY PARAGRAPH 8 OF RULE 38—Filed May 31, 1940

It is hereby stipulated and agreed by and between the parties in the above entitled cause, by and through their respective counsel of record, that in printing the record in said cause for the use of the Supreme Court, the clerk may omit from the printed record the following matters which are not essential to a consideration of the questions presented by the petition for certiorari, said matters appearing in the transcript of the record certified by the Clerk of the United States Circuit Court of Appeals for the Eighth Circuit at the pages indicated.

It is further stipulated and agreed that the omission from the record of these nonessential matters shall not prejudice, or be used to advantage by either party to said cause.

Pages	Matters
28 and 29	Stipulation Designating Parts of Record and Proceedings to be Included in Record on Appeal.
38	Appearance of Counsel for Appellants in Cause No. 11480.
38	Appearance of Mr. T. W. Bockes and Mr. Henry N. Ess as Counsel for Appellee in Cause No. 11480.

[fol. 64]

39	Appearance of Mr. T. W. Bockes as Counsel for Appellee in Cause No. 11480

Pages	Matters
39	Appearance of Mr. Fred Belemere and Mr. Marcy K. Brown, Jr., as Counsel for Appellant in Cause No. 11489.
39	Appearance of Mr. John M. Cleary as Counsel for Appellant in Cause No. 11489.
40	Appearance of Counsel for Appellee, Union Pacific Railroad Co., in Cause No. 11489.
40	Appearance of Messrs. Garrett & Ruark and Mr. Spurgeon L. Smithson as Counsel for Appellees L. Singer & Sons, et al., in Cause No. 11489.
55	Motion of Appellants to Stay Issuance of Mandate in Cause No. 11480.
56	Order Staying Issuance of Mandate in Cause No. 11480.
56	Motion of Appellant to Stay Issuance of Mandate in Cause No. 11489.
57	Order Staying Issuance of Mandate in Cause No. 11489.

Dated this 27th day of May, 1940.

John M. Cleary, Ruby D. Garrett, Fred Ruark, Spurgeon L. Smithson, Counsel for Petitioners.
A. C. Spencer, Henry N. Ess, Counsel for Respondent.

[fol. 64½] [File endorsement omitted.]

[fol. 65] SUPREME COURT OF THE UNITED STATES

No. 825

ORDER ALLOWING CERTIORARI—Filed April 22, 1940

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Eighth Circuit is granted.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

[fol. 66] SUPREME COURT OF THE UNITED STATES

No. 826

ORDER ALLOWING CERTIORARI—Filed April 22, 1940

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Eighth Circuit is granted.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

Endorsed on cover: File Nos. 44,232, 44,233. U. S. Circuit Court of Appeals, Eighth Circuit. Term No. 34. L. Singer & Sons et al., petitioners, vs. Union Pacific Railroad Company. Term No. 35. Kansas City, Missouri, petitioner, vs. L. Singer & Sons et al. Petitions for writs of certiorari and exhibit thereto. Filed March 19, 1940. Term Nos. 34, O. T., 1940, 35, O. T., 1940.